

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Mar 02, 2023

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

MARIO PATRICIO-CAZARES,

Defendant.

No. 2:20-CR-0026-WFN-1

ORDER

Pending before the Court is Defendant's Second Motion to Dismiss Case. ECF No. 44. A hearing on the motion and a pretrial conference were held on February 22, 2023. The Defendant, who is not in custody, was present and represented by Carter Powers Beggs and Stephen Roberts, Jr., and assisted by Court-appointed interpreter Bea Rump; Assistant United States Attorney Michael Ellis represented the Government.

Mr. Patricio-Cazares was indicted for being found in the United States after removal. ECF No. 17. He moves to dismiss the indictment under 8 U.S.C. § 1326(d), arguing the removal order is invalid because the Immigration Judge did not give him an opportunity to apply for voluntary departure at the removal hearing. ECF No. 44 at 7–9. Instead, the Immigration Judge summarily denied voluntary departure without developing the record and weighing Mr. Patricio-Cazares's positive and negative equities. *Id.* The Motion is denied for the reasons explained below.

To collaterally attack his removal order, Mr. Patricio-Cazares must show that

(1) [he] exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived [him] of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

1 8 U.S.C. § 1326(d).

2 Ninth Circuit precedent previously excused defendants from satisfying requirements  
3 (1) and (2) if the removal order violated their due process rights and they suffered prejudice  
4 as a result. *See United States v. Cisneros-Rodriguez*, 813 F.3d 748, 756 (9th Cir. 2015). But  
5 the Supreme Court recently decided that "[t]he Ninth Circuit's interpretation is incompatible  
6 with the text of § 1326(d)" and that all three of § 1326(d)'s requirements are mandatory.  
7 *United States v. Palomar-Santiago*, 141 S. Ct. 1615, 1620 (2021).

8 **1. Mr. Patricio-Cazares did not exhaust available administrative remedies.**

9 The Government argues the Motion should be denied because Mr. Patricio-Cazares  
10 failed to exhaust administrative remedies. ECF No. 72 at 2–9. The Court agrees.

11 Mr. Patricio-Cazares concedes he did not pursue administrative remedies but argues  
12 he was not required to do so. ECF No. 73 at 3–6. According to Mr. Patricio-Cazares,  
13 *Palomar-Santiago* only overturned Ninth Circuit precedent that excused defendants from  
14 the first two prongs of § 1326(d) when they were removed for an offense that did not actually  
15 make them removable. *Id.* The Supreme Court did not, the argument goes, disturb Ninth  
16 Circuit precedent excusing defendants from the first two prongs of § 1326(d) in other  
17 circumstances. *Id.*

18 Mr. Patricio-Cazares asks the Court to read *Palomar-Santiago* too narrowly. The  
19 Supreme Court "h[e]ld[] that each of the statutory requirements of § 1326(d) is mandatory,"  
20 *Palomar-Santiago*, 141 S. Ct. at 1622, and said that courts cannot excuse mandatory  
21 requirements imposed by statute, *see id.* at 1621. True, the Court did not say directly that  
22 the Ninth Circuit's exhaustion-excusals rules are all invalid. But "the issues decided by  
23 the higher court need not be identical . . . to be controlling. Rather, the relevant court of  
24 last resort must have undercut the theory or reasoning underlying the prior circuit precedent  
25 in such a way that the cases are clearly irreconcilable." *Miller v. Gammie*, 335 F.3d 889,  
26 900 (9th Cir. 2003). The Supreme Court's decision that the statutory requirements of §  
27 1326(d) are mandatory—and cannot be excused—is clearly irreconcilable with  
28 previous Ninth Circuit rules excusing defendants from § 1326(d)'s requirements in some

1 circumstances. Therefore, Mr. Patricio-Cazares cannot be excused from § 1326(d)'s first  
2 two requirements.

3 Mr. Patricio-Cazares also argues he exhausted the administrative remedies that were  
4 actually available. ECF Nos. 71 at 6–7, 73 at 4–5. He claims administrative remedies were  
5 not available to him as a practical matter because he was never informed that he was eligible  
6 for voluntary departure, and because administrative remedies were not practically available,  
7 there was nothing to exhaust. *Id.*

8 This argument too is foreclosed by *Palomar-Santiago*. There, the defendant argued  
9 administrative remedies were not practically available to him because he was wrongly  
10 advised that his prior conviction made him removable, and he could not have been expected  
11 to know this was incorrect. *Palomar-Santiago*, 141 S. Ct. at 1621. The Supreme Court  
12 rejected the argument, noting that "[t]he immigration judge's error on the merits does not  
13 excuse the noncitizen's failure to comply with a mandatory exhaustion requirement if further  
14 administrative review, and then judicial review if necessary, could fix that very error." *Id.*  
15 Because the Immigration Judge's error has no bearing on the actual availability of  
16 administrative remedies, the Court rejects Mr. Patricio-Cazares's argument.

17 Mr. Patricio-Cazares argues the holding of *United States v. Mendoza-Lopez*, 481 U.S.  
18 828 (1987), supports his position. ECF Nos. 71 at 6–7, 73 at 2–4. There, the Court  
19 determined the defendants had been deprived of judicial review because their appeal  
20 waivers were not considered or intelligent. *Mendoza-Lopez*, 481 U.S. at 840. So, Mr.  
21 Patricio-Cazares argues, defendants automatically satisfy the first two requirements of  
22 § 1326(d) if they were not properly advised of available administrative remedies. *See* ECF  
23 Nos. 71 at 6–7, 73 at 2–4. But *Mendoza-Lopez* does not address § 1326(d)'s exhaustion  
24 requirement because the decision predates § 1326(d). The Supreme Court decided in  
25 *Mendoza-Lopez* that defendants must have an opportunity to challenge the validity of their  
26 removal order before that order can be the basis for criminal sanctions. *Mendoza-Lopez*, 481  
27 U.S. at 837–39. The Court did not decide that Congress could never require defendants to  
28 exhaust administrative remedies first.

1 Finally, Mr. Patricio-Cazares argues that existing Ninth Circuit precedent survives  
2 *Palomar-Santiago* because it does not actually "excuse" defendants from § 1326(d)'s first  
3 two requirements, but instead deems them to have been satisfied in some circumstances. The  
4 Court rejects this characterization. First, the Ninth Circuit itself described its precedent as  
5 "excusing" compliance with § 1326(d)(1) and § 1326(d)(2). *See, e.g., United States v.*  
6 *Vidal-Mendoza*, 705 F.3d 1012, 1015 (9th Cir. 2013) ("[W]e excuse the alien from  
7 demonstrating ' . . . exhaust[ion].'"). Second, and more importantly, the Court cannot put  
8 form over function to avoid binding precedent. Whether § 1326(d)(1) and § 1326(d)(2)  
9 are "excused" or "deemed satisfied," the result is the same. And the Supreme Court has  
10 already decided that actual compliance is mandatory. *See Palomar-Santiago*, 141 S. Ct.  
11 at 1622.

12 Because Mr. Patricio-Cazares did not exhaust available administrative remedies, the  
13 Motion is denied.

14 **2. Mr. Patricio-Cazares was not improperly deprived of judicial review.**

15 Mr. Patricio-Cazares argues that he meets the second requirement of § 1326(d) for the  
16 same reasons he meets the first: he was not given the opportunity to apply for voluntary  
17 departure. The Court rejects the argument for the same reasons. Under *Palomar-Santiago*,  
18 compliance with § 1326(d)(2) is mandatory and cannot be excused. Because Mr. Patricio-  
19 Cazares was not improperly deprived of judicial review, the Motion is denied.

20 **3. The entry of the removal order was not fundamentally unfair.**

21 A removal order is fundamentally unfair if it was entered in violation of the  
22 defendant's due process rights and the defendant was prejudiced as a result. *United States v.*  
23 *Arias-Ordonez*, 597 F.3d 972, 976 (9th Cir. 2010).

24 The Government concedes Mr. Patricio-Cazares's due process rights were violated  
25 when he was not given the opportunity to apply for voluntary departure but argues that Mr.  
26 Patricio-Cazares was not prejudiced by the violation. ECF No. 47 at 4–8. The Court agrees.

27 A defendant who was denied the opportunity to apply for voluntary departure was  
28 prejudiced if it is plausible that the Immigration Judge would have granted voluntary

1 departure had she considered "the positive and negative factors . . . relevant to" the decision.  
2 *United States v. Gonzalez-Flores*, 804 F.3d 920, 927 (9th Cir. 2015).

3 Because substantial factors weighed against voluntary departure, it is not plausible  
4 that the Immigration Judge would have granted it. At the time of Mr. Patricio-Cazares's  
5 removal hearing, he had already been caught attempting to reenter the United States illegally  
6 at least three times after being granted voluntary return in 2008. ECF No. 47-2. He had also  
7 been convicted of fourth degree assault once, ECF No. 47-3, and driving under the influence  
8 three times, ECF Nos. 47-4, 47-5, 47-6. "[D]riving under the influence is a serious negative  
9 factor." *United States v. Rojas-Pedroza*, 716 F.3d 1253, 1265 (9th Cir. 2013). Because Mr.  
10 Patricio-Cazares's significant negative factors outweigh the positive equities of his  
11 employment history and family ties, it is not plausible that the Immigration Judge would  
12 have granted him voluntary departure. *See id.*

13 Mr. Patricio-Cazares argues that the Court should not now consider his assault  
14 conviction or two of his DUI convictions because the Immigration Judge did not consider  
15 them. But considering factors that were not presented to the Immigration Judge is exactly  
16 what Mr. Patricio-Cazares himself is asking the Court to do. If it is fair to consider positive  
17 equities that were never presented to the Immigration Judge, then it is also fair to consider  
18 negative equities that were never presented to the Immigration Judge. Besides, that is what  
19 precedent appears to require. *See Gonzalez-Flores*, 804 F.3d at 927 (explaining that courts  
20 should "consider the positive and negative factors an IJ would consider relevant to an  
21 exercise of discretion").

22 Because entry of the removal order was not fundamentally unfair, the Motion is  
23 denied.

24 This Order is entered to memorialize and supplement the oral rulings of the Court.  
25 Accordingly,

26 **IT IS ORDERED** that:

27 1. Defendant's Second Motion to Dismiss Case, filed October 2, 2020, **ECF No. 44**,  
28 is **DENIED**.

# h Rücken

WM. FREMMING NIELSEN  
SENIOR UNITED STATES DISTRICT JUDGE